Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning	)	DA 91-577
Regulation of Satellite Earth Stations	)	45-DSS-MSC-93

To the Commission:

OPPOSITION OF
MICHIGAN, ILLINOIS AND TEXAS COMMUNITIES CONSISTING OF:

Michigan: **City of Detroit, City of Grand Rapids, Ada Township, Alpine Township, Baldwin Township, City of Battle Creek, City of Birmingham, Caledonia Township, Village of Chelsea, City of Coldwater, Coldwater Township, City of East Tawas, City of Escanaba, City of Ferndale, Georgetown Charter Township, Harrison Township, Holland Township, City of Ishpeming, City of Kentwood, City of Livonia, City of Marquette, City of Plainwell, Richmond Township, Robinson Township, City of Saline, City of Southfield, City of Wyoming, Zeeland Charter Township**

Illinois: **Illinois Chapter of NATOA, City of Chicago Heights, Village of Mount Prospect, Village of Skokie**

Texas: **City of Fort Worth, City of Arlington, City of Coppell, City of Flower Mound, City of Grand Prairie, City of Hurst, City of Kennedale, City of Longview, City of Louisville, City of Plano, City of University Park**

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MIT Communities oppose the comments and petition for reconsideration of the Satellite Broadcasting and Communications Association (and allied satellite interests).

The SBCA's suggestion that the Commission become, in effect, the "Federal Zoning Commission" for satellite dish matters lacks any statutory support, and ignores the constitutional and statutory interest of State and local authorities in managing land use in their communities.

The Commission must reject the satellite industry's "waiver only" position which is worse than the current "presumption approach", which presumption approach itself goes too far and is invalid.

The Commission's proposed per se preemption of private restrictions is likely to be unconstitutional.

Municipalities must be able to consider health concerns. The SBCA's request that they not be able to consider this has no support in the record and violates the 1996 Telecommunications Act.

Satellite dish owners should not be able to ignore local police power regulations prior to their review by this Commission or a court.

The SBCA's suggested standards for waivers is inappropriate and goes too far.

The procedures suggested by the SBCA for petitions for waivers or declaratory rulings do not provide adequate notice or the time for meaningful comment by municipalities or interested citizens. If the initial rulings by this Commission on waivers or declaratory in fact

will be as precedential as the SBCA suggests, there should be every attempt made to encourage participation. Therefore, a notice of such petitions should be published in the Federal Register with comments due 60 days after such publication.

The Commission's current preemption rules go too far and are invalid. MIT Communities support the Petition for Reconsideration of the National League of Cities et. al. in this regard.

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To the Commission:

OPPOSITION OF MICHIGAN, ILLINOIS AND TEXAS COMMUNITIES

I. INTRODUCTION

A. MIT Communities and Their Interest In This Matter.

Michigan, Illinois and Texas communities ("MIT Communities") submit this Opposition to the Petitions for Reconsideration (variously styled) submitted in this docket by the Satellite Broadcasting and Communications Association of America ("SBCA") and related satellite broadcasting interests. This Opposition is submitted on behalf of these 42 communities and their approximately two million residents from three states as follows:

From Michigan, 28 communities;[1] from Illinois, 3 communities[2] plus the Illinois Chapter of the National Association of Telecommunications Officers and Advisors (NATOA); and from Texas, 11 communities.[3] Each of these municipalities has adopted zoning, building and land use codes which, among other things, affect satellite dishes in order to provide for orderly development within their community, protect the public health and safety, and regulate the use of property in the public interest. The Illinois Chapter of NATOA informs and participates in legislative, judicial, regulatory and technical developments that impact local governments on cable and telecommunications matters. Its membership includes municipal officials actively involved in and responsible for cable and telecommunications matters throughout the state of Illinois.

On March 11, 1996, the Federal Communications Commission (the "Commission") released its Report and Order and Further Notice of Proposed Rulemaking In the Matter of Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, DA

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[1]City of Detroit, City of Grand Rapids, Ada Township, Alpine Township, Baldwin Township, City of Battle Creek, City of Birmingham, Caledonia Township, Village of Chelsea, City of Coldwater, Coldwater Township, City of East Tawas, City of Escanaba, City of Ferndale, Georgetown Charter Township, Harrison Township, Holland Township, City of Ishpeming, City of Kentwood, City of Livonia, City of Marquette, City of Plainwell, Richmond Township, Robinson Township, City of Saline, City of Southfield, City of Wyoming, Zeeland Charter Township

[2]Illinois Chapter of NATOA, City of Chicago Heights, Village of Mount Prospect, Village of Skokie

[3]City of Fort Worth, City of Arlington, City of Coppell, City of Flower Mound, City of Grand Prairie, City of Hurst, City of Kennedale, City of Longview, City of Louisville, City of Plano, City of University Park

91-577, 45-DSS-MISC-93. The Commission adopted a rule which preempts local zoning regulation of satellite earth stations.[4] The Commission also requested further comments on its adopted rule in light of the passage of the Telecommunications Act of 1996.[5]

This Opposition is directed to the further comments and petition for clarification of the SBCA submitted in this docket on April 15, 1996 and the related petitions (variously styled) submitted by Hughes Network Systems, Inc., Primestar Partners, United States Satellite Broadcasting Company, Alphastar Television Network and DIRECTV. The preceding submittals are essentially similar if not identical and for convenience are referred to herein as the petitions for reconsideration of the SBCA. MIT Communities submit this Opposition because the changes requested by the various industry petitions are inappropriate and violate the Communications Act of 1934 (as amended by the 1996 Telecommunications Act) and MIT Communities' related concern about the breadth of the preemption rule as adopted by this Commission in March.

II. THE COMMISSION SHOULD NOT ADOPT THE SBCA COMMENTS OR PETITION.

A. Introduction.

As is discussed below, MIT Communities support reconsideration of the Commission's rule as set forth in the Petition for Reconsideration filed by the National

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[4]47 C.F.R. § 25.104.

[5]The Telecommunications Act of 1996, Public Law 104-104, 110 Stat. 56 (1996) ("the Act").

League of Cities because the preemption rule as currently adopted by this Commission goes too far. If the suggestions set forth in the Further Comments by the SBCA are adopted by the Commission, the problem will be exacerbated. The revisions suggested by the SBCA, if adopted, would further emasculate the ability of municipalities to protect the health, safety, and welfare of their citizens in spite of the fact that the Commission recognizes that legitimate health and safety factors should be considered in these matters.

B. Exclusive Jurisdiction.

MIT Communities respectfully submit that the Commission is ill-equipped to be a Federal zoning board and should reject the satellite industry's invitation to become one. The Commission should grant substantial deference, at least in the first instance, to local legislative concerns regarding health and safety. The satellite broadcast industry has already convinced the Commission that in some instances local municipalities cannot make appropriate decisions with regard to health and safety concerns. Now, it attempts to convince the Commission that State and Federal courts cannot be trusted to apply the law and that only the Commission can make fair and impartial decisions. An ancillary effect of the industry suggestion is that all who disagree with the satellite industry will be required to go to Washington, D.C. to resolve any disputes. The Commission should simply reject this suggestion out of hand.

In fact, the satellite dish industry's attempt to turn this Commission into the "Federal Zoning Commission" for satellite dish matters must be rejected because it lacks any statutory support. The satellite industry attempts to expand beyond reason Section 205 of the Act

which provides that this Commission shall "have exclusive jurisdiction to regulate the provision of direct to home satellite services." The satellite industry ignores the following sentence which states:

> "As used in this subsection, the term "direct to home satellite services" means the distribution or broadcasting of programming or services by satellite directly to the subscribers premises . . ."

Section 205 thus relates to exclusive jurisdiction over programming, not the satellite dishes themselves, nor in any way to this Commission now becoming the "Federal Zoning Commission" for 38,000 municipalities. Nor (a point which the satellite industry conveniently ignores) does it empower this Commission to become the "Federal Building Code Commission" regulating building codes, fire codes and electric codes (as they may affect satellite dishes) for the same 38,000 municipalities[6].

The reasons that lead Congress to reject making this Commission a "Federal Zoning Commission" for satellite dish matters dictate that the request by the SBCA must be denied. These concerns have been well articulated by this Commission: For example, Commissioner Chong, in her statement accompanying this Commission's February 29, 1996 order in this proceeding, stressed "the interest that state and local authorities have been managing land use in their communities." This is reflected also in paragraph 62 of the Commission's February 29, 1996 order which states that "as we have recognized throughout this proceeding, state and local land-use regulations have traditionally been near the core of [local] governments

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[6]Building and similar codes are discussed more below, at Section III.

general police power [and contrasting private restrictions on this basis]." Such concerns underlie the Supreme Court decision in U.S. v. Lopez, ___ U.S. ___, 115 S. Ct. 1624 (1995). Zoning, building and land use regulations are police powers reserved to states under the Tenth Amendment of the U.S. Constitution. The satellite industry attempts to convert the Commerce Clause into a general grant of Federal police power. This is unavailing under U.S. v. Lopez.

Land-use, zoning, building, electric and fire code matters vary significantly from state to state, from community to community and from district to district within a community. Attempts develop with a national "one size fits all" zoning code (or building, fire, or electric code) thus must fail. This Commission simply lacks the resources, staff and knowledge to decide such land use and building, fire and safety code matters for 38,000 communities where the particular decisions may vary significantly with each particular parcel of land and locale in question.

Finally, there is no basis for the SBCA's suggestion that municipalities will fail to implement this Commission's rules. SBCA's citations of purported harm to consumers is belied by the millions of satellite dishes currently in existence, the fact that the direct broadcast satellite industry has had the fastest growth of any consumer product in recent memory, and the minuscule number of complaints the industry can muster, as compared to the nation's 265 million residents and 38,000 municipalities.

C. Waiver Only/Presumption.

The Commission must reject the satellite industry's "waiver only" position. In this regard, MIT Communities support the position of the National League of Cities that Section 207 of the Act and its legislative history do not support the Commission's rule as to the current presumption of invalidity. The waiver only approach is even more invalid and offensive. The MIT Communities respectfully suggest that the Act and legislative history do not support, and certainly do not compel, the waiver only approach. The Commission should reject this suggestion.

D. Proposed per se preemption of private non-governmental restrictions.

The proposed rule is applicable to private non-governmental restrictions, the MIT Communities suggest that such a rule is susceptible to a successful challenge as a governmental taking of private property without compensation. Private restrictive covenants are generally deemed to be property rights. Property owners bargain for such rights and the value paid for real estate subject to such covenants may be dependent on the scope and type of the restrictions. To adopt a per se preemption rule invites litigation on the constitutionality of the Commission's action.

E. Health Concerns.

Cities, villages and townships must continue to be able to consider health concerns. The Commission must reject the SBCA suggestion that the Commission make the conclusive scientific finding that there are no "health" objectives that could ever apply to receive only antennas. Because RF radiation concerns were the only health concerns raised in the record

does not mean that there could be no other health concerns. The record does not support the finding which the SBCA requests. In particular, science may discover legitimate health concerns in the future. Health issues routinely change over time due to scientific advances. The Commission thus must maintain the language of the current rule and continue to allow for the consideration of health concerns in these matters.

Lead-based paints provide a helpful analogy or example. The presence of lead-based paints in housing is now well recognized as a major national health problem. Such paints have now been banned. Much housing is now being stripped (at a substantial expense) by workers wearing special protective clothing to remove lead-based paints from the interior of buildings.

The SBCA's proposed rule change is intended to prevent states, communities (and apparently other arms of the Federal government) from taking any action with respect to harmful health aspects from satellite dishes which may occur in the future, such as if, for example, the paints or coatings placed on such dishes by their manufacturers turn out to be as harmful to the public health as lead-based paints. There is no basis for the Commission precluding other arms of government from acting on health issues that may arise. Indeed, the SBCA's request is simply a good example of overreaching by the satellite industry where it leapfrogs from a claimed lack of RF-radiation problems to requesting a total preclusion of all local consideration of any health problem.

The examples given by the SBCA thus do not support the "health" preemption which it requests and its request for a health preemption should be rejected.

In addition, MIT Communities respectfully submit that the health preemption requested by the satellite industry does not comply with the 1996 Telecommunications Act. As discussed above, Section 205 of the Act confers jurisdiction on the Commission only for "direct to home satellite services." Such services are defined in that section to mean only the programming transmitted or broadcast by satellite directly to the subscribers' premises. See also Section 602(B)(1) for the same definition. And Section 207 of the Act only relates to restrictions which prohibit viewers receiving over the air video services. Health considerations, such as those noted above, are not such prohibitions.

F. Liability for Actions Prior to Commission Review.

The SBCA suggests that a satellite dish owner should have the right to flaunt local police power regulations adopted in good faith without fear of penalty. The SBCA suggestion amounts to the following: "Go ahead. Break the law. You need fear no penalty until after the law is upheld. Even if the law is valid, you can operate illegally, at least until the government proves the law is valid."

MIT Communities submit that such a scheme is entirely foreign to our system of law and the Commission should reject the suggested change to the rule.

G. Standard for Waivers.

The Commission is urged to substitute, in advance by rule, its judgment for that of local municipalities as to what may be "local concerns of a highly specialized or unusual nature." The existing language of the rule already intrudes into what was historically a matter of local police power regulation. To go further, without any evidence that local

municipalities are incapable of demonstrating to the Commission legitimate local concerns of a highly specialized or unusual nature is, at best, premature. It is also insulting to thousands of local governmental officials. The Commission should go no further than it already has.

In addition, the waiver language requested by the SBCA simply has little applicability to building, electric and fire codes. This is because the waiver standards suggested by the SBCA relate to preserving a "highly specialized or unique feature of a particular location" with the "physical boundaries of the particular location . . . no broader than necessary." This language (whether deliberately or by oversight) may have the effect of excluding from waivers local building codes, electric codes or fire codes necessary to preserve property and lives that may be affected by the improper mounting or location of a satellite antenna. Such conditions include wind loads (hurricanes which might blow dishes off buildings); ice loads (with the same effect); earthquakes or other conditions. As the satellite industry has previously noted in its filing in this docket (1995 Initial Comments of Hughes Network Systems, Inc., pages 3-4, footnote 1), it routinely places thousands of pounds of weights on the dishes it places on top of commercial structures to try to prevent them from moving. Now it attempts to preclude local building safety officials from considering the cumulative impact of the particular placement of those weights, together with the snow loads, ice loads and other items that may be placed on the roof of a building.

This specific example indicates why the waiver standards suggested by the SBCA must be rejected.

H. Procedures.

MIT Communities strongly oppose the procedures proposed by the SBCA for declaratory rulings and waivers. The requested procedures attempt to preclude participation by municipalities (or members of the public) and violate the Administrative Procedures Act by attempting to amend the Commission's rules without following the required procedures.

1. Invalid Rulemaking. The Administrative Procedures Act and the Commission's rules set forth specific procedures for rulemakings. The Commission cannot evade these procedures by attempting on a case by case basis to effectively amend or adopt its rules under the guise of "precedent." Members of the Commission have been critical of past actions by the Commission in attempting to avoid or evade the rulemaking process by purported case by case decisions.

For example, Commissioner Barrett in his statement accompanying the adoption of the Commission's March 11 order in this proceeding said as follows:

> "While Section 303 of the Communications Act may arguably give the Commission latitude in promulgating rules and regulations as the public convenience, interest or necessity requires, I would oppose, as I have in the past, any Commission action that continuously modifies its final rules through the waiver process."

The Commission should thus reject the invitation from the satellite industry to attempt to construct new or amended rules without adequate public input and without complying with the rulemaking requirements of the Administrative Procedures Act.

2. Federal Register Notice. The notice requirements suggested by the SBCA are inadequate and preclude meaningful public comment.

If and to the extent the rule change suggested by the SBCA is adopted it must be amended to require publication in the Federal Register of notices of petitions for waivers or declaratory rulings. The SBCA asks that petitions for waivers or declaratory rulings only be "placed on public notice for public comment." Apparently, as a practical matter this means there will be a one or two line notice on a sheet distributed from time to time by this Commission, and which, as a practical matter, is only subscribed to by telecommunications industry law firms, telecommunications trade associations and the like. It will not, as a practical matter, be made available in any meaningful fashion to the nation's 38,000 municipalities or to the over 265 million residents who may be affected.

If, as the SBCA suggests, the Commission's decisions -- especially the early ones -- will be precedential and important, notice must be published in the Federal Register so that all interested and affected parties are truly provided some form of notice and an opportunity to comment. The first sentence of subsection (d) of the rule proposed by the SBCA thus must read as follows:

> "Notice of petitions for declaratory rulings under paragraph (c) of this section and petitions for waivers filed under paragraph (e) of this section shall be published in the Federal Register."

3. Time Periods. The time periods chosen by the SBCA are an attempt to deny participation by municipalities. Many city charters affirmatively preclude the retention of outside counsel -- such as is necessary to participate in these proceedings -- without the prior

approval of the city council. Other cities effectively have such requirements because all contracts must be approved in advance by city council (not unlike the procurement requirements of the Federal government).

Many city councils meet only once a month (and others only twice a month). Many city councils have no meetings at all during summer vacations or at the time of the Thanksgiving or Christmas/New Year holidays. The result is that it may take 30 days (minimum) to get approval for a municipality to retain outside counsel knowledgeable about this Commission's procedures so that a municipality can comment on a petition for waiver or for declaratory ruling. After adding to this adequate time to receive the notice in the Federal Register, evaluate its importance, make an internal staff recommendation and then start the formal city council approval process, approximately 60 days notice is needed for meaningful participation by many of this nation's 38,000 municipalities in petition proceedings[7].

Therefore, the second sentence of the rule submitted by the SBCA, if adopted by this Commission should require all comments to be submitted to the Commission "within 60 days of publication of notice in the Federal Register."

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[7]MIT Communities are generally able to participate in these proceedings for two reasons -- First, some had already obtained requisite council approval (due to this Commission having issued an order in March or due to its being a part of the implementation of the 1996 Telecommunications Act). Second, MIT Communities, more than the national average, represent those who lack any such prior local commission/council approval requirement (some municipalities with such a requirement were not able to get approval in time to participate).

III. THE COMMISSION SHOULD RECONSIDER THE PREEMPTION RULE.

MIT Communities support the Petition for Reconsideration filed by the National League of Cities and other municipalities in this matter. The MIT Communities concur in the arguments presented by the National League of Cities, as follows:

First, the MIT Communities submit that the Commission has departed from the plain language and the legislative history of Section 207 of the Act. The MIT Communities adopt the arguments of the National League of Cities on this issue and do not repeat them here.

Second, the broad scope of the preemption rule is not justified by reliance on the Commerce Clause and is contrary to the most recent pronouncement on the subject as set forth by the United States Supreme Court in U.S. v Lopez, 115 S.Ct. 1624 (1995). The Commission has impermissibly converted the Commerce Clause to a grant of general federal police power. Zoning, building, and land use regulations are police powers reserved to the states under the Tenth Amendment of the U.S. Constitution. Although the states have delegated some of their authority to local municipalities, they have not ceded their power in these traditional areas of local concern to the federal government.

Third, the record does not support the preemption of all local regulations "affecting" small satellite dishes. Less than a dozen anecdotal instances of suspect local regulations are referenced in the record. Yet, there are 38,000 local jurisdictions which have building, zoning, and land use regulations. There is no proof of a national problem which would justify the immediate invalidation of thousands of local regulations. To the contrary, the record shows that the satellite dish industry has been spectacularly successful, enjoying

unprecedented growth. There is simply no basis to conclude that local regulations have impaired the growth of the satellite dish industry. Moreover, there is certainly no justification for the blanket invalidation contained in the preemption rule.

Finally, as the Petition for Reconsideration by the National League of Cities points out, the Commission has not considered the practical effects of the rule, in particular its effect on building and electric codes. Many local jurisdictions have adopted the National Electric Code (the "NEC") by reference. The NEC specifies health and safety requirements relative to the installation of electrical devices in homes and other buildings.

In addition, many (if not most) local jurisdictions have adopted the building code promulgated by Building Officials and Code Administrators International, Inc. ("BOCA Building Code") governing such health and safety issues such as roof, wind, and snow loads, which are relevant to the installation of satellite dishes on buildings. The preemption rule will be contended to automatically invalidate the applicability of this nationally recognized building code in thousands of municipalities due to its failure to recite in each of the several sections that may affect satellite dishes the "health, safety or aesthetic objective" which it forwards, even though that objective is stated at the start of the code. For example, the 1987 edition of the BOCA code states at the outset as follows:

> "The code will be construed to secure its expressed intent, which is to ensure public safety, health and welfare, insofar as they are affected by building construction through structural strength, adequate means of egress facilities, sanitary equipment, light and ventilation, and fire safety, and in general to secure safety, life and property from all hazards incident to the design,

> erection, repair, removal and demolition, or use and occupancy of buildings, structures, or premises."

If municipalities are required to repeat this or some similar statement in each section of their building code which may affect satellite dishes, they cannot do so in a few days or even in a few weeks.

This is because amending a national building code at the local level is not simply a matter of amending the local ordinances which adopt these national codes by reference. For instance, in Michigan (which is typical of many states), the Construction Code Act, MCLA §§125.1501, 125.508, permits municipalities to adopt nationally recognized health and safety codes by reference, but only if the municipality does not alter them. If changes or other alterations to the language of the national codes are requested, the municipality must first obtain approval of the alterations from the State Construction Code Commission. The Commission meets infrequently -- not on a monthly basis. It is likely to take several months before a municipality receives approval of an amendment to a national health and safety code. In fact, the Construction Code Commission has ninety days after an amendment is filed to approve or reject it.

The Commission thus may have created a "regulatory gap" where for a period of several months minimum, building codes which (as evidenced by the purpose clause quoted above) only apply to health and safety may not be enforceable. During that time, there may be no building code regulation of the health and safety aspects of the connection and installation of satellite dishes. Thus, the current preemption rule exhibits an alarming lack

of concern for what the Commission itself concedes are legitimate health and safety objectives.

It is ironic that General Motors, through a subsidiary (DIRECTV) argues in its Petition for Reconsideration that the Commission need have no concern with respect to building code or safety aspects relating to the installation of satellite dishes because "installers can be relied upon to install DBS dishes safely without the threat of regulatory enforcement." DIRECTV Petition for Reconsideration, at 6. It lies ill in the mouth of General Motors to make such arguments directly or through subsidiaries -- it was not General Motors' building safe cars that lead to the Corvair, then to Ralph Nader's book Unsafe at any Speed and thence to the National Highway Traffic Safety Administration and the extensive safety rules for automobiles which we have today.

Municipalities nationwide have similarly adopted building, fire and electric codes out of proven necessity -- because it has been shown time and again that without such codes buildings will not be built safely, they will not be wired safely and when a fire occurs, egress will be obstructed. Thus just as government regulations affecting cars are needed to have safe vehicles, building, fire and electric codes are necessary to have safe buildings. Relying on auto companies/contractors voluntary efforts is inadequate. Such codes of necessity must address satellite dishes, along with other items placed on buildings.

One of the major failings of this Commission's rulemakings so far is its failure to distinguish between zoning and land use codes on the one hand and building, fire and electric

codes on the other. The latter only affect safety and cannot and should not in any way be preempted by this Commission.

IV. CONCLUSION.

For the reasons set forth above, MIT Communities respectfully oppose the petition and comments submitted by the SBCA and various industry groups and request the Commission to take actions as set forth above.

Respectfully submitted,

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